

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ERIC SOLTERO

Claimant

VS.

NATIONAL BEEF PACKING COMPANY

Respondent

AND

FIDELITY & GUARANTY INSURANCE CO.)

Insurance Carrier

Docket No. 1,014,091

ORDER

Claimant's former attorney requested review of the July 13, 2009 Order by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on September 18, 2009.

APPEARANCES

Peter J. Antosh, claimant's former attorney, of Dodge City, Kansas, appeared. Scott J. Mann, claimant's present attorney, of Hutchinson, Kansas, appeared as well as D. Shane Bangerter, of Dodge City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has reviewed and considered the record listed by the ALJ in her Order which addresses the pending fee dispute between Mr. Antosh's firm¹ and Scott Mann. At oral argument, Mr. Mann agreed that there was no dispute as to the \$692.34 in expenses incurred by Mr. Antosh's firm and that those expenses could be immediately paid without prejudice to the remaining claim or the balance of the fee claimed by either Mr. Mann or

¹ Claimant was originally represented by Jesse Garcia, a member of Garcia & Antosh, L.L.P. Claimant released Mr. Garcia as his counsel in August 2006 and immediately retained Mr. Mann. It is that change in counsel that has given rise to this rather lengthy dispute as to attorney's fees.

Mr. Antosh and his firm. The Board therefore orders that payment to be made immediately.²

ISSUES

This is a dispute between two law firms over fees generated in a workers compensation claim. This is the second time this matter has been before the Board as it was originally remanded to the ALJ for further evidence so that she could appropriately determine, based upon quantum meruit, the fees that were due to the respective lawyers.³

After a short hearing, the ALJ found that Mr. Antosh is entitled to \$1,750.00 in attorney fees for 14 hours of service at \$125.00 an hour. Mr. Mann's fee contract was approved less amounts owed to Mr. Antosh. Mr. Antosh has appealed this finding arguing that his firm's fees should be greater than the \$1,750. Mr. Antosh maintains that his firm provided approximately 75 percent of the work when viewed over the entirety of the time spent on the claimant's claim. And to split the fee in such an uneven percentage encourages subsequent lawyers to attempt to step into claims at a late date, achieve a resolution and realize a far greater financial benefit for themselves. Moreover, Mr. Antosh points out that claimant settled his claim for 24 percent, the same impairment value that he asserts was originally offered to claimant during the time claimant was represented by his firm.

Mr. Mann argues that he provided significant legal services to the claimant and increased the claimant's settlement offer to 24 percent which included the preservation of future rights. He therefore contends he is entitled to fees based on the contingency fee agreement with the claimant. In the alternative, Mr. Mann argues that Mr. Antosh is entitled to fees based on quantum meruit of no more than \$1,400 at \$100 an hour for 14

² The payment of these expenses was agreed to at the October 8, 2008 Motion Hearing and again at the oral argument held on September 18, 2009.

³ The Board also noted that as of the time of the first appeal in this matter Mr. Mann had failed to file his attorney's fee agreement as required by K.S.A. 44-536. The parties were also directed to explain to the ALJ how it came to be that Mr. Mann's attorney fee contract (which had yet to be filed with the Division as required by law) was approved by a Special Administrative Law Judge when the underlying claim had been settled by an Agreed Award before ALJ Fuller as was represented by Mr. Mann. It appears, based on statements made at the most recent oral argument, that Mr. Mann's statements in a document filed with the Court as to his fee being approved by a Special Administrative Law Judge were in error. However, there is still no clear explanation within the record as to how Mr. Mann could represent to the Court that his fee agreement had been approved by a Special Administrative Law Judge when it had not and when the agreement had yet to be filed. It seems from the record in this matter that both the ALJ and Mr. Mann found these things to be of small consequence, but the Board does not.

hours worth of legal representation as he maintains Mr. Antosh's services provided no benefit to the claimant and could be categorized as detrimental to the claimant.⁴

After a close examination of the parties' briefs and the entire record in this matter as well as the parties statements during oral argument, the Board finds that in the interests of justice⁵, this matter should be remanded to the ALJ. The record should be reopened for additional evidence. As noted during the oral argument, it is unclear whether a 24 percent offer was conveyed to Mr. Garcia and in turn to the claimant. And that fact has become relevant to the parties' dispute. Mr. Mann asserts that no such offer was made and that he bettered claimant's position in this matter. But he was not a party to those negotiations and has no first hand knowledge on that issue. Only Mr. Garcia, Mr. Soltero and respondent's counsel, Mr. Bangerter, can speak to that issue. Pursuant to K.S.A. 44-536 the existence of a prior offer may well be an important fact to consider.⁶ And while that is not the only factor that may be considered, that fact has become such a decisive one that it must be addressed. Moreover, there are issues related to Mr. Mann and his fee contract (the absence of any contract in the court's file and the alleged approval of that contract by a Special Administrative Law Judge) that have yet to be addressed as directed in the Board's April 27, 2009 Order.

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated July 13, 2009, is set aside and this matter is remanded to the ALJ to open the record for further proceedings consistent with the findings set forth above.

⁴ Respondent's Submission Brief (dated July 10, 2009) filed on Aug. 7, 2009.

⁵ *Neal v. Hy-Vee, Inc.*, 277 Kan. 1, 81 P.3d 425 (2003).

⁶ K.S.A. 44-536(e) limits the amount of attorney's fees in certain instances when a claimant is offered a settlement before he or she is represented by counsel.

IT IS SO ORDERED.

Dated this _____ day of October 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Peter J. Antosh, Former Attorney for Claimant
Scott J. Mann, Attorney for Claimant
D. Shane Bangerter, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge